crowd so that they might escape in a commotion that might have ensued, and their conduct in that respect pointed to nothing else but their guilt. In the instant case the circumstances were that PW1 had been lying in wait then running out of his ambush position and trying to stop the respondent. She did not stop, so he gave chase after her. When he finally stopped her, he identified himself as a police officer. She tried to escape. He gave chase and finally caught up with her. At that time, she was shivering and looked pale. Is this conduct by itself sufficient to prove legal possession of the incriminating documents against the respondent? Is it the only and irresistible inference that the conduct of the respondent showed that she was in possession of the incriminating documents bearing in mind the fact that possession in the sense as had been indicated earlier must be proved by the prosecution beyond any reasonable doubt against the respondent? To my mind, although the conduct of the respondent in this case may be said to be highly suspicious, I do not consider however that, without more, it is sufficient to go beyond the line of strong suspicion and cause it to be at the stage where it can be said that the prosecution, merely by the conduct of the respondent, has proved possession in law against her. In this case, had the prosecution gone further and proved that the respondent had sole custody and control of the bicycle, then this, coupled with the fact of the conduct of the respondent, may probably raise an irresistible inference against her that she had possession of the incriminating documents. But what evidence is there regarding the relationship between the respondent and the bicycle? There is none beyond the evidence that she was, at the material time, riding on it. In any event, there is no evidence to indicate that the respondent had the sole custody and control of the bicycle including the bicycle bag. In the circumstances and bearing in mind the strict proof of possession required of the prosecution, I do not consider that the lower court had erred in holding that the prosecution had not succeeded in proving possession against the respondent and in the circumstances the appeal against the order of acquittal of the respondent is dismissed.

In deciding whether, at the end of the case for the prosecution, a *prima facie* case had been made out against the respondent, the learned trial Magistrate cited the case of *Public Prosecutor* v. *Omar Lopez*.[4] I would point out that the relevant provisions of the Sarawak Criminal Procedure Code dealt with by that case have been replaced by those in the existing Criminal Procedure Code, and hence that case should, in my view, no longer be considered as authority on the present test as to what constitutes a *prima facie* case against an accused person. The wording of section 173(f) and (h), Criminal Procedure Code is different. In this connection, attention is drawn to the case of *Tan Ah Ting* v. *Public Prosecutor*,[6] the headnote of which reads: —

"The effect of section 173(f) of the Criminal Procedure Code is that it is the duty of a magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt.

Before calling upon the defendant to make his defence, the court has only to be satisfied that the prosecution has made out a *prima facie* case.

The meaning of the expression "*prima facie*" case/evidence generally accepted by the courts is where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence."

Appeal dismissed.

Solicitors: *Robin Hii & Co.*

ALWEE v. LAI KONG FOOK & ORS.

[O.C.J. (Abdoolcader J.)
March 6, 7, May 13, 14, & June 3, 1980]
[Ipoh — Civil Suit No. 346 of 1976]

Contract — Oral agreement for sale of land — Specific performance — No binding contract — Land sold to third party who had no notice of earlier contract — Damages only remedy.

Practice and Procedure — Pleadings — Evidence not supporting allegations in pleadings.

In this case the plaintiff claimed specific performance of an oral agreement allegedly entered with the first and second defendants for the sale of certain premises. He alleged that the premises had contrary to the agreement been transferred to the third defendant and he claimed in the alternative damages against the third defendant and an order to cancel the transfer to him. According to the pleadings it was alleged that the first and second defendants agreed to sell the premises to the plaintiff. The plaintiff lodged a caveat against the property and obtained an order restraining the Registrar of Titles from registering the transfer in favour of the third defendant.

Held: (1) the evidence adduced in this case showed that there was no oral agreement as alleged between the plaintiff and the first and second defendants and therefore the claim must be dismissed;

(2) on the facts the third defendant had no notice of the alleged agreement;

(3) the order restraining the Registrar of Titles from registering the transfer of the premises in favour of the third defendant must be discharged.

Cases referred to:-

(1) *Farrell* v. *Secretary of State for Defence* [1980] 1 W.L.R. 172, 180.

(2) *Ong Chat Pang & Anor.* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224, 227.

CIVIL SUIT.

W.S.W. Davidson for the plaintiff.

Colin R. Clark for the defendant.

Cur. Adv. Vult.

Abdoolcader J.: The plaintiff claims in these proceedings specific performance of an oral agreement allegedly entered into with the 1st and 2nd defendants for the sale to him of the premises known as No. 1 Jalan Alma Bakar, Batu Gajah ('the premises'), and further and in the alternative damages against them, and as against the 3rd defendant he seeks an order to cancel the transfer of the premises executed in his favour by the 1st and 2nd defendants.

At the outset counsel on both sides agreed that two issues arise for determination, namely, (1) whether there was a legally binding contract between the

plaintiff and the 1st and 2nd defendants, and (2) whether the 3rd defendant had notice of this alleged agreement and, if so, at what stage. It was common ground that if the plaintiff loses on the first issue then he must fail *in toto*, and that if he succeeds thereon but loses on the second issue then he is only to be entitled to damages. Both sides agreed that both issues involve pure questions of fact and indeed counsel for the plaintiff in his submission conceded that the whole case depends on the court accepting the oral evidence of the plaintiff and his two witnesses. No doubt because pure questions of fact were involved counsel for the plaintiff in his opening address stated that both sides had agreed to leave the question of damages until after the determination of the two issues in question, and he therefore did not propose to adduce evidence in respect of damages until then.

At the conclusion of the case, in assessing the evidence adduced and making findings of fact, I delivered an extemporaneous judgment at some length and dismissed the plaintiff's claim with costs. The plaintiff, who I presume has the benefit of competent advice, has now lodged an appeal against that decision and I now therefore reduce into writing the oral judgment which I delivered in court and would add immediately that every word of what appears hereafter repeats what I said in my oral judgment.

Before I proceed to consider the evidence, I must deal with the question of what I consider to be serious departures from the plaintiff's pleading in relation to the evidence adduced. I should perhaps in this connection refer to the very recent decision of the House of Lords in *Farrell* v. *Secretary of State for Defence*[1] in which Lord Edmund-Davies said (at page 180) that to shrug off a criticism as 'a mere pleading point' is bad law and bad practice, for the primary purpose of pleadings remains, and it can still prove of vital importance, which is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

The plaintiff pleads in his statement of claim that during the year 1973 the 1st and 2nd defendants in consideration of the payment of a deposit of $1,000 agreed to sell the premises to him for a sum of $46,000. But in giving evidence on oath, in answer to a question I put to him, he said that the agreement to purchase the premises for $46,000 was made with one Ah Pin, who I shall advert to later, and that he paid the deposit of $1,000 to Ah Pin. When I referred this bit of evidence to Mr. Davidson for the plaintiff in the course of his final address to me, all he could say by way of explanation was that the plaintiff was talking loosely in the language of a layman, and he did not exactly mean what he said as the 1st and 2nd defendants were present when the plaintiff claims the oral agreement was entered into and Ah Pin's authority could be assumed by their presence. There is no substance whatsover in this sort of explanation, as I had put to the plaintiff his evidence on what transpired when the alleged oral agreement was supposed to have been entered into and asked him a specific question and this was his answer to me, and the fact that he knew what he was saying is borne out by his going on to add that the 1st and 2nd defendants were present but no agreement was entered into with them to purchase the premises.

The plaintiff then continues in his statement of claim to plead that in reliance on the said verbal agreement and in the expectation of acquiring ownership of the premises, he incurred an expenditure of some $50,000 on extensions and renovations thereto, but in his evidence he said in examination-in-chief that he made the extensions and renovations before the commencement of his tenancy of the premises on July 15, 1972. Under cross-examination he resiled and this time said that the renovations were carried out some two months after the commencement of the tenancy, and they had all been completed by about September 1972. They were therefore certainly not carried out as he pleads in reliance on the alleged oral agreement to purchase the premises which he claims was entered into according to his evidence some two or three months after the beginning of 1973. He also pleads in his statement of claim that he had warned the 3rd defendant not to purchase the premises from the 1st and 2nd defendants on June 30, 1976 but his evidence shows that the alleged conversations with the 3rd defendant took place in May 1976. If the date was indeed June 30, 1976 as stated in his statement of claim, he could not succeed on the second issue because the transfer by the 1st and 2nd defendants in favour of the 3rd defendant was executed on June 8, 1976. At a very late stage on the day before the conclusion of these proceedings and in the course of the 1st defendant giving evidence, Mr. Davidson applied to amend the statement of claim by substituting 'June 30, 1976' in the statement of claim by 'a date in May 1976', and I allowed this in the absence of any objection by counsel for the defendants.

The plaintiff also pleads in his statement of claim that he is ready, willing and able to complete the purchase of the premises pursuant to the oral agreement he claims was entered into. This, of course, is a necessary prerequisite to any claim or order for specific performance and at the conclusion of his evidence-in-chief he said he still wishes to buy the premises and is in a position to do so. In the course of final submissions I was informed that the alleged balance purchase price in the sum of $45,000 had not been deposited in court. I then asked Mr. Davidson whether the plaintiff was indeed ready, willing and able to complete as he claims and after some hesitation he replied that 'the plaintiff informs me that he has the $45,000 balance purchase price available now.' I then put this to the plaintiff through the court interpreter and he at first answered in the affirmative but then went on to say that he has $20,000 in the bank, and there is of course only his word as to this, and that he will make efforts to raise the balance of $25,000. I cannot therefore see that he has indeed shown his readiness and ability to complete as he claims in the event that he succeeds in establishing the oral agreement he relies on. Now this point alone and that also in relation to his admission that he entered into the agreement with Ah Pin and not with the 1st and 2nd defendants would suffice to put him out of court, but there is much more to come.

Turning now to the evidence, the plaintiff's version is that in about June 1972 which he later changed to July, he saw Ah Pin about renting the premises as he wanted to open a restaurant business. It would appear from the evidence that Ah Pin was the developer of the row of shophouses in Jalan Alma Bakar which includes the premises, and I think it is clear from the evidence of the 1st and 2nd defendants that Ah Pin is in fact their brother-in-law Cheng Lam Peng also known as Ah Peng. Since this Ah Pin plays an important role in the negotiations and transaction the plaintiff said he entered into, I should perhaps at this stage touch upon the fact that he was not called as a witness. In answer to a question put by me the plaintiff admitted that Ah Pin is available and that he knows where he is but he had not issued a subpoena to him to attend court. Mr. Davidson in his concluding address said that the reason why Ah Pin was not called was because, as he put it, 'we assumed he would support the defendants'. I must say immediately that it was not for anyone to assume anything of the sort. It is for the court to determine the credit and credibility of a witness and in the event that he was called the plaintiff would have the full protection of the provisions of the Evidence Act, 1950 and in particular section 154 which would enable a party to apply for and obtain leave to cross-examine his own witness. In the circumstances, it would appear to me essential for the plaintiff to have called Ah Pin as a witness to discharge the burden of proof on him under sections 101, 102 and 103 of the Evidence Act and establish his case and in particular to show that Ah Pin had authority to act for and on behalf of the 1st and 2nd defendants in the transaction in issue and as a result of his failure to do so without any plausible excuse or justification I cannot but apply the full force and vigour of the presumption under illustration (g) to section 114 of the Evidence Act against the plaintiff.

Reverting to the evidence of the plaintiff, he said that he arranged for the tenancy of the premises from Ah Pin with effect from July 15, 1972 at a monthly rent of $280. He averred that Ah Pin was then anxious to sell the premises and not rent it out but the plaintiff told him that he would discuss the question of purchasing the premises after one year whereupon Ah Pin agreed to rent out the premises to him. He went on to say that when he first discussed the question of tenancy Ah Pin agreed to sell the premises to him for $42,000 and said that if the plaintiff did not buy the premises after one year the rent would be increased by $5. He then said that he made some alterations by way of extensions and renovations to the premises before the commencement of the tenancy and obtained Ah Pin's consent and permission from the Town Board therefor. As I have said earlier, under cross-examination he changed his story and said that the renovations were carried out after the commencement of the tenancy and completed by about September 1972, and he further agreed in cross-examination that he did not put terrazo flooring on the ground floor as he had said in his evidence-in-chief but only had marble put on the walls in compliance with the requirements of the Town Board for an eating-shop. Both the 1st and 2nd defendants who owned the premises denied signing any plans for the alterations made to the premises and the plaintiff produced no evidence whatsoever from the Town Board in connection with the alterations effected nor any plans signed by the owners which must necessarily be a prerequisite for approval by the Town Board.

The plaintiff said that a Town Board official, Ah Pin and the 1st and 2nd defendants came to the premises sometime in July 1972 after the commencement of the tenancy after he had written to the Town Board for permission. He said that the 1st defendant asked him whether he really wanted to buy the building and he replied in the affirmative and told him that he would buy the building after one year. He then said they discussed the price and then resiled to say the price was not discussed on that day but only sometime in 1973. The plaintiff did not say that at this meeting his witness, Mat Daud bin Ahmad (PW3), and a Mohamed who it appears is now in India but whose evidence could have been obtained *de bene esse* or on commission but was not, were present. But PW3 who said that in the company of Mohamed he first met the plaintiff on that day and was conveniently present at this meeting gave evidence which differed in material aspects from that of the plaintiff. PW3 said that at that time renovation was still going on in the shop whereas the plaintiff had said he was asked to point out the works to be done. PW3 also said in his evidence that the plaintiff had told the 1st defendant that he would buy the shop if he could break down the three rooms and the latter agreed to this but the plaintiff said nothing to this effect.

Adverting now to the evidence on the oral agreement allegedly made, the plaintiff said this was in 1973 but he could not remember the month and could only say that it was two or three months after the beginning of the year. He said that a discussion took place in the premises between him and Ah Pin and the 1st and 2nd defendants and there were also present PW3, A.K. Mohamed whom I have already referred to and a Syed Mohamed who he said has since died. Briefly, his evidence was to the effect that Ah Pin and the 1st and 2nd defendants asked for $48,000 as the purchase price and the plaintiff and his three friends requested a reduction, and after some discussion the 1st and 2nd defendants and Ah Pin agreed to sell the premises for $46,000. He went on to say they asked for $4,000 as a deposit and he paid $1,000 in cash to Ah Pin and promised to pay the balance of $3,000 in two months' time. Ah Pin then gave him a receipt for $1,000 and he said in answer to me that he had lost the receipt. He then went on to say that he kept the receipt in his shop in Temoh but there was a theft in his shop and he lost the receipt and that he had made a police report about the theft.

Under cross-examination, his version about how the oral agreement was arrived at took a different turn. He said that in July 1972 he had an agreement with Ah Pin to purchase the premises for $42,000 but this agreement was cancelled by the second agreement in 1973. He then said that three or four days before he paid the $1,000 deposit in 1973 he discussed with Ah Pin and the 1st and 2nd defendants the sale of the premises and he had told them he would pay

$18,000 as the first payment for the premises towards the purchase price of $46,000 and then resiled to say that the purchase price was not determined on that day. He then said that Ah Pin and the 1st and 2nd defendants agreed to his paying $18,000 as a first payment, and three or four days later he agreed to pay $4,000 out of the $18,000 which was to be paid towards the purchase price of $46,000. He then said that when he agreed to pay $18,000 the purchase price was $48,000 and then added: 'On that day I did not agree to the $48,000', whatever that meant. He continued by saying, all under cross-examination, that after payment of the $1,000 there were further negotiations with Ah Pin 10 or 15 days later but there was no subsequent change in the agreed purchase price of $46,000. All this appears quite inconsistent with his evidence-in-chief on the oral agreement which he seeks to establish. And then, as I have already stated, in answer to me, he said his agreement to purchase the premises for $46,000 was made with Ah Pin and not with the 1st and 2nd defendants.

On the question of the $1,000 deposit the plaintiff says he had paid and the receipt he obtained therefor, he said that he gave the money to Ah Pin and obtained a receipt from him. Under cross-examination, he said Ah Pin wrote the receipt which stated: 'I received $1,000 from Alwee' and it was signed by Ah Pin. He then had to admit that it was written in Chinese characters and the $1,000 was written in figures and he just presumed that what was written was to the effect he had earlier stated. His witness, PW3 who was again conveniently present when this transaction was supposed to have taken place when he visited the plaintiff only a second time, sought to corroborate the plaintiff's evidence on what transpired on this occasion. He however said that the plaintiff took out some money and handed it to the 1st defendant and asked for a receipt whereupon the 1st defendant wrote out the actual receipt on a piece of paper. Under cross-examination, he was asked whether he was certain that it was the 1st defendant and not anyone else who had written the receipt and handed it to the plaintiff and he replied emphatically that he was indeed certain. Here then is a vital discrepancy in the evidence of the plaintiff and his own supporting witness which must necessarily throw considerable doubt on what actually occurred on that day.

With regard to the receipt which the plaintiff says was lost, it would appear that he was either making allegations of gross negligence against his solicitors, which, of course, is a matter between them, or he was clearly indulging in a patent lie. If indeed there was a receipt but which he no longer has, it is astounding, to say the least, that this was not disclosed when he made discovery in his affidavit of documents as indeed he should have by stating on oath that he had but does not now have in his possession this receipt by reason of its having been lost. Not only that but what is more, in his affidavit of documents filed in these proceedings he states on oath that according to the best of his knowledge, information and belief he does not have now and never had in his possession, custody or power, or in that of anyone else any other document whatsoever relating to the matter in question in this suit other than the documents set out in the schedules thereto and no mention is made of this receipt he spoke of. He does not disclose this receipt in his statement of claim nor in his application for a caveat against the property in question dated July 16, 1976 nor again in a letter he wrote on August 14, 1976 to the Registrar of Titles, Perak.

The police report he said he had made about the theft in his shop in Temoh as a result of which he lost the receipt was not produced. It would have been interesting to see if this report could have substantiated his story about the receipt. When I mentioned this matter of the police report not being produced in the course of delivering oral judgment at the conclusion of the case, the plaintiff interrupted through the court interpreter to say that he had handed the police report to his lawyer. That may be so, and that again is a matter between them, but I cannot see why the police report was not put in if there was one and it was of any probative value for the purposes of the plaintiff's case. Under cross-examination, the plaintiff said he lost the receipt for $1,000 in 1975 and then retracted this to say he could not remember whether it was in 1975, although according to him he had a police report which would have specified the date of the loss if true.

Under cross-examination, the plaintiff admitted that he keeps accounts for his business and records therein all monetary transactions, that the payment of the $1,000 was entered in his accounts and that he still has the account book where this item is recorded. He went on to say that he did not verify the date of payment of the $1,000 from his account book because he had forgotten about that and added that he had informed his lawyer about this entry in the account book. The account book was not produced and it is not even mentioned in making discovery in his affidavit of documents. It is absolutely inconceivable that if his solicitors knew about this entry in the account book they would not have produced or disclosed it in his affidavit of documents. Once again, I must say that the plaintiff is either alleging crass negligence against his solicitors or is clearly lying in a blatant attempt to substantiate his case. If there was any omission in this respect, and I really cannot see how there could have been any in respect of such crucial corroborative evidence, there was ample opportunity for the account book to have been produced in court at the adjourned hearing which was necessitated by the absence of one of the plaintiff's witnesses or even at any other stage of the proceedings by an application for this purpose in order to ensure that justice is done. I am therefore presented only with the wholly unsubstantiated allegation made on behalf of the plaintiff without the production of what I would consider to be a vital piece of documentary evidence to corroborate his claim.

The statutory evidential presumption I have already dealt with in relation to Ah Pin must accordingly be equally applied against the plaintiff in respect of the documents I have referred to but which were not produced by him or referred to in discovery of documents.

The plaintiff took no steps to enter into a written contract or lodge a caveat against the property until

July 1976, some three years after the alleged payment of $1,000. He took no steps to protect his interest and on his own evidence he had to pay another $3,000 being the balance of the agreed deposit of $4,000 in two months' time but said that he did not pay this balance, and saw Ah Pin only once about paying the balance and then said that he made another two or three attempts to make payment to Ah Pin, on each occasion in front of his shop on the roadside but he was told by Ah Pin to wait. He made no formal tender of the alleged balance to the 1st and 2nd defendants. This is certainly not the conduct one would expect in the circumstances of a person claiming to be endowed with enforceable contractual rights.

The plaintiff through a solicitor applied for the entry of a private caveat against the property by an application dated July 16, 1976 and in setting out the grounds of his claim therein stated that at the time of renting the premises the 1st and 2nd defendants who were the owners agreed to give him the first choice if they decided to sell the house, and the price was $46,000. This averment is no more than an allegation of an option without any consideration and, in answer to me, he admitted that this averment was untrue. It must be borne in mind that his application for a caveat embodying, *inter alia,* this averment which he now admits is false was verified by a statutory declaration in compliance with the provisions of section 323 of the National Land Code. He did not mention in his application for a caveat an alleged agreement to purchase the premises for $46,000 and that he had paid $1,000 as a deposit therefor and said that this was because he did not have the receipt. He then said that at the time of applying for the caveat he was in distress and might have forgotten to inform the lawyer about it, then retracted this and said that he did inform his lawyer that he had an agreement to purchase the premises for $46,000. Here again is another veiled allegation of negligence or whatever against another solicitor.

On August 14, 1976 the plaintiff, out of pique, so it would appear, wrote to the Registrar of Titles, Perak, with carbon copies to the Controller (*sic*) of Income Tax, Ipoh, and the State Valuation Officer, Ipoh, to inform them of the sale of the premises to the 3rd defendant for $49,000 and stating that he was surprised that the consideration stated was that amount as he had offered to purchase the premises for $70,000. He then went on to say in that letter that he understood the premises were in fact sold for $80,000, that he was most surprised to note that it was valued at $49,000 by the authorities concerned and he presumed the purchaser had paid the extra $40,000 under the counter to avoid income tax. He said under cross-examination that this letter was sent through his lawyer's office and then went to explain that his lawyer's office typed this letter and gave it to him, and he posted it. No mention is made in this letter of his agreement to purchase the premises for $46,000 or that he had paid $1,000 as a deposit as he alleges. He said under cross-examination that he did not offer to purchase the premises for $70,000 but that he intended to pay $70,000 but did not tell this to Ah Pin or the 1st and 2nd defendants, whatever he meant by this. The transfer executed by the 1st and 2nd defendants in favour of the 3rd defendant clearly shows that the stated consideration of $49,000 was accepted and certified by the Stamp Office as the correct and adequate value. In answer to me, the plaintiff said that his lawyer's clerk wrote this letter for him, that he is a public-spirited citizen and he wrote this letter alleging evasion of stamp duty and income tax in the hope that the defendants would get into trouble. When asked where he got the information that the 3rd defendant had purchased the premises for $80,000 he said that he got this from some people but was unable to say who informed him.

I found the plaintiff to be as evasive and as unreliable a witness as one can find, and the two witnesses he called in support of his testimony were no better. Abdullah s/o Kunjali Kutty (PW2) who runs a restaurant in Ipoh said that in about May 1976 he went all the way to the premises in Batu Gajah to meet the plaintiff to enquire whether it was true his shop building was to be sold. Under cross-examination, he said he heard from the public in Ipoh about this and as a result rushed up to Batu Gajah to make sure but could not say from which particular person he had heard this. He then went with the plaintiff to the 3rd defendant's shop and this evidence was to substantiate the plaintiff's evidence of his second visit to the 3rd defendant. He said that after seeing the 3rd defendant he and the plaintiff went to a stall in the market where they met the 1st defendant. In answer to me, PW2 said that he could not remember the date when he saw the 1st and 3rd defendants, that it was the first time he had seen them but only saw them again in court and can recognise them. He did not impress me as being reliable, appeared shifty in giving evidence and it just sounded far from convincing that he should make this trip or rather to use his own words 'rushed up to Batu Gajah' all the way from Ipoh to enquire from the plaintiff on a matter which was no concern of his and then be available as a witness to substantiate the plaintiff's evidence of his visit to the 3rd defendant.

As for PW3 who lives in Teluk Anson, he admitted that he had visited the plaintiff at the premises in Batu Gajah only on three occasions, that he did not know the plaintiff until the first visit in the company of Mohamed and that all his visits were casual and not pre-arranged, and that it was merely by coincidence that he happened to go to the plaintiff's shop and be conveniently present at the crucial times in 1972 when he related the discussion with the 1st and 2nd defendants and two others, in 1973 when the alleged oral agreement was entered into, the purchase price determined and the deposit of $1,000 paid, and sometime in 1976 when he accompanied the plaintiff to the 3rd defendant's shop. When I asked him his relationship with the plaintiff it was only after some prevarication that he admitted that he is a good friend of the plaintiff. There are as I have pointed out earlier the differences in his version of what took place in 1972 from that given by the plaintiff and also in relation to the alleged oral agreement entered into in 1973 when he said that the deposit was paid to the 1st defendant who gave the receipt whereas the plaintiff said it was Ah Pin. I am therefore unable to

accept this witness's evidence at face value or indeed at all.

The 1st and 2nd defendants gave evidence totally denying that they had ever agreed on any occasion to sell the premises to the plaintiff. The 1st defendant said that he had never seen PW3 before he appeared in court to give evidence. They denied the evidence adduced by and on behalf of the plaintiff of the discussions and negotiations they were alleged to have participated in with regard to the sale of the premises to the plaintiff. They said that they never signed any plans in connection with or authorised alterations to the premises. They knew the premises were rented out to the plaintiff and this was on the recommendation of their brother-in-law Cheng Lam Peng and for the purposes of taking a tenancy the plaintiff went to the 1st defendant's tea-store and that was the only time he had ever seen him. The 2nd defendant said that she agreed to the premises being let out to the plaintiff when told about this by the 1st defendant. I had no reason whatsoever to doubt their testimony and found them to be reliable witnesses; their demeanour in the witness box substantiates this. They were cross-examined somewhat half-heartedly and were not shaken or discredited in any way. In all these circumstances, I cannot find that the plaintiff has established the existence of an oral agreement with the 1st and 2nd defendants as he alleges for the sale of the premises to him for $46,000 and that he has paid a deposit of $1,000 therefor. I make this finding, of course, on a balance of probabilities but must add that the evidence adduced by and for the plaintiff is such that I would come to the same conclusion even if it were permissible, which it is not, to apply the test of a balance of speculative and shifting possibilities.

As Mr. Davidson himself submitted at the outset, if the plaintiff loses on the first issue then it is quite clear that that would be the end of the matter, and it would not be necessary to proceed to discuss the second issue on the question of whether and if so at what stage the 3rd defendant had notice of the alleged oral agreement which the plaintiff relies on for the sale of the premises to him. I will, however, for good measure briefly touch on this issue.

The plaintiff stated in evidence that he saw the 3rd defendant three times in May 1976. On the first occasion he was accompanied by PW3 and the 3rd defendant denied he was going to purchase the premises. That is all he said but PW3 said that he heard the 3rd defendant tell the plaintiff he would not be buying the shop as he did not have enough money. The plaintiff then said that he went again five or six days later to see the 3rd defendant, this time accompanied by PW2, when the 3rd defendant is alleged to have admitted that he was about to purchase the premises. The plaintiff said that the conversation was between him and the 3rd defendant whereas PW2 testified to the effect that it was he who was doing all the talking with the 3rd defendant. The plaintiff went on to say that he met the 3rd defendant again that month for the third time when he went alone and told the 3rd defendant that he had an agreement with the 1st and 2nd defendants to buy the premises. He then changed his story to say that he had told the 3rd defendant about this on both the first and second occasions as well. Under cross-examination when confronted with his plea in his statement of claim that the 3rd defendant intimated to him that he was about to complete the purchase of the premises on June 30, 1976, all the plaintiff could say was that after the three meetings in May he met the 3rd defendant again on June 30, 1976. It is strange that he could remember this date but could not remember the date or even the month when he is supposed to have paid the deposit of $1,000. I think it would be a fair inference that this evidence as to his meeting the 3rd defendant again on June 30, 1976 was clearly put forward to meet the averment regarding that date in the statement of claim, and I have already mentioned the application to amend the statement of claim in this regard at a late stage in the proceedings.

The 3rd defendant gave evidence that he had purchased the premises from the 1st and 2nd defendants and made the first payment to them in the sum of $8,000 by a cheque dated May 19, 1976. The transfer in his favour was executed on June 8, 1976 by the 1st and 2nd defendants and he had given two other cheques in payment of the balance purchase price, and according to the evidence of the 1st defendant these two other cheques were post-dated and given before the execution of the transfer. The 3rd defendant denied the evidence of the plaintiff and his witnesses of any visits by the plaintiff to him or that he was warned by him against the purchase of the premises and said that he knew nothing at all about the plaintiff wanting to purchase the premises. Again as with the other defendants I found the 3rd defendant to be a truthful witness and he was not in the least bit shaken in cross-examination. I do not therefore accept the evidence given by the plaintiff and his witnesses in this regard and, in any event, the point is moot as I have already found that there was no oral agreement between the plaintiff and the 1st and 2nd defendants as he alleges. In the event it becomes unnecessary to consider the application in this case of the provisions of section 26 of the Specific Relief Act, 1950 and the principle enunciated in *Ong Chat Pang & Anor.* v. *Valliappa Chettiar*[2] (at page 227) with regard to the question of a *bona fide* purchaser for value without notice of an earlier contract.

I think that it is clear that what happened is that the plaintiff on coming to know that the premises had been sold to the 3rd defendant realised that he stood to lose substantially if evicted as he had spent some moneys in making alterations to the premises for the purposes of meeting the requirements of the Town Board for an eating-shop and in an effort to overcome this difficulty he has made a frantic attempt to retain his hold on the premises by making the allegation that he has some form of agreement with the 1st and 2nd defendants to purchase the premises. This is borne out by his evidence that when he went to see the 3rd defendant on the third occasion he told the latter that his family was staying in the upstairs portion of the building and that he had no other place to go and requested him not to purchase the building, and, further, in answer to me, he said that his primary fear was eviction by the 3rd defendant from the premises. I should perhaps also add that he went on

to say that he did not take more active and earlier steps to protect his rights in the matter of the alleged agreement to purchase because he was busy in running his business — a statement which, in my view, surpasses credulity.

For the reasons stated, I dismissed the plaintiffs claim with costs, discharged the order of August 30, 1976 restraining the Registrar of Titles from registering the transfer of the premises in favour of the 3rd defendant and ordered an enquiry as to the damages suffered by the 3rd defendant as a result of that order on the plaintiff's undertaking as to damages.

Claim dismissed.

Solicitors: *Lewis & Co.; Ngan & Tan.*

CHE NOH BIN YAACOB v. SYARIKAT KILANG GETAH SENG HIN

[O.C.J. (Mohamed Zahir J.) April 12 & May 19, 1980]
[Kota Bharu — Civil Suit No. 149 of 1977]

Employment — Damages — Whether worker can claim both under SOCSO Act and the common law — Scope of s. 31 of SOCSO Act, 1969 — Employees' Social Security Act, 1969, ss. 2(6), (10), (11), 15(1) & 31(ii).

The plaintiff in this case was employed at the defendants' rubber factory at Kota Bharu. In the course of his employment, the plaintiff's left fingers were drawn into a power operated grinding machine thereby crushing the four left fingers. As an insured person under section 2(11) of Employees' Social Security Act, 1969 (SOCSO), he received $1,935.42 under the said Act. The present claim is for damages under common law.

Held, dismissing the plaintiff's claim: (1) SOCSO is not a temporary measure as can be seen from section 15(1) of the Act;

(2) section 31(ii) takes away the right of an injured employee to sue in court for damages.

CIVIL SUIT.

Datuk Wan Mustapha for the plaintiff.

Porres P. Royan for the defendants.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff claims for damages arising from an accident which occurred on April 23, 1975. He was employed at the defendants' rubber factory at 3¼ mile-stone, Jalan Kuala Krai, Kota Bharu. In the course of his employment, the plaintiff's left fingers were drawn into a power operated grinding machine thereby crushing the four left fingers, exposing the bones and tendons.

On the date of hearing, counsel for the plaintiff agreed that the plaintiff is an insured person under section 2(11) of Employees' Social Security Act, 1969 (SOCSO) and that the plaintiff had received $1,935.42 under SOCSO and it was further agreed by both counsel that the machine through which the plaintiff received the injury comes within the Factories Act.

The defence pleaded that the accident was caused or contributed to by the plaintiff and in the alternative pleaded section 31 of SOCSO Act which reads as follows: —

"An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person —

(i) any compensation under the Workmen's Compensation Ordinance, 1952, or

(ii) damages under any other law for the time being in force,

in respect of an employment injury sustained as an employee under this Act."

The injury comes under the definition of "employment injury" under section 2(6) of SOCSO Act which reads as follows: —

"(6) 'employment injury' means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment in an industry to which this Act applies."

The Act is made applicable to Kota Bharu *vide* P.U.(B) 384 dated August 15, 1973 and the accident occurred in 1975.

Counsel for the defendants asks the court to dismiss the plaintiff's claim as contravening section 31 of SOCSO. I allowed both parties to submit on this point alone.

Counsel for the plaintiff submitted that SOCSO Act gives a temporary measure in case of accidents in the course of employment where the accident was caused not by one person's negligence. He referred to section 15 of the Act and submitted that a rubber factory is not within the Act and that section 31(ii) of the Act does not take away the right of an injured person to sue under the common law.

With respect, I do not agree with the plaintiff's counsel. Section 2(10) of the Act gives the definition of the word "industry" which reads as follows: —

"(10) 'industry' means any business, trade, undertaking, manufacture or calling of employers, and includes any calling, service, employment, handicraft or industrial occupation or avocation of employees."

I think rubber factory comes under the definition of "industry". SOCSO is not in my view a temporary measure as can be seen from section 15(1) of the Act and I am of the opinion that section 31(ii) as it says takes away the right of an injured employee to sue in court for damages. In this case the plaintiff had already received the money paid to him under SOCSO.

I dismissed the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Datuk Wan Mustapha & Co.; Shook Lin & Bok.*